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"No Damage" Clauses in Construction Contracts: A Critique

Douglas S. Oles

"NO DAMAGE" CLAUSES IN CONSTRUCTION CONTRACTS: A CRITIQUE

A controversial aspect of competitively bid construction contracting is the so-called "no damage"[1] provision. Especially common in contracts advertised by private or local government entities,[2] this exculpatory clause purports to bar recovery by a contractor for delay damages attributable to the actions of the owner.[3] Typically, a contract containing such a clause provides that although no monetary compensation for these delays will be permitted, a time extension will be granted, equal in length to the period by which the contractor's delays are deemed[4] attributable to the actions of the owner.[5]

1. Also known as a "no damages" or "no damage for delay" clause. Annot., 74 A.L.R.3d 187, 194 (1976). This annotation is also useful as a general collection of cases involving the validity of "no damage" clauses.

2. *See* 4A J. McBRIDE & I. WACHTEL, GOVERNMENT CONTRACTS § 32.10[5] (1977) (common practice to insert "no damage" clauses into contracts advertised by private, *i.e.*, nongovernmental, owners). For cases providing examples of "no damage" clauses in contracts advertised by local government owners, *see, e.g.*, F.D. Rich Co. v. Wilmington Hous. Auth., 392 F.2d 841 (3d Cir. 1968); Hawley v. Orange County Flood Control Dist., 211 Cal. App. 2d 708, 27 Cal. Rptr. 478 (1963); Hallett Constr. Co. v. Iowa State Highway Comm'n, 261 Iowa 290, 154 N.W.2d 71 (1967); A. Kaplen & Son, Ltd. v. Housing Auth., 42 N.J. Super. 230, 126 A.2d 13 (1956); Ericksen v. Edmonds School Dist. No. 15, 13 Wn. 2d 398, 125 P.2d 275 (1942). Similar efforts by local governmental owners to limit contractors' rights to impact damages were at issue in V.C. Edwards Contracting Co. v. Port of Tacoma, 83 Wn. 2d 7, 514 P.2d 1381 (1973); Bignold v. King County, 65 Wn. 2d 817, 399 P.2d 611 (1965); City of Seattle v. Dyad Constr., Inc., 17 Wn. App. 501, 565 P.2d 423 (1977).

3. "No damage" clauses may work to bar recovery by a contractor against an owner, or by a subcontractor against its prime contractor. *See, e.g.*, McDaniel v. Ashton-Mardian Co., 357 F.2d 511 (9th Cir. 1966) ("no damage" clause barred subcontractor's recovery from prime contractor); J. McBRIDE & I. WACHTEL, *supra* note 2, § 32.10[5]. In this comment, the party barred from additional recovery by a "no damage" clause will for convenience be referred to as a "contractor." Similarly, the term "owner" will encompass contract owners, prime contractors, and all their agents which are insulated from liability for impact damages by a "no damage" provision.

4. The determination of how much time extension is granted on the basis of owner-caused delay is generally reserved to the reasonable discretion of the architect or other agent of the owner. *See, e.g.*, the clause set forth at note 5 *infra*.

5. An example of a "no damage" clause recently upheld by the Washington court of appeals is quoted in Nelse Mortensen & Co. v. Group Health Coop., 17 Wn. App. 703, 566 P.2d 560 (1977):

> If . . . the *contractor is delayed* at any time in the progress of the work *by any of the following causes, the contract time shall be extended* for such reasonable time as the architect shall determine. . . . *Such extensions* shall postpone the beginning of period for payment of liquidated damages but they and the events producing them *shall not be ground for claim by the contractor of damages or for addi-*

Generally, state courts and federal courts applying state law have held such clauses effective to preclude claims by contractors for damages due to delays in commencing or completing the job which are attributable to the owner.[6] In Washington,[7] "no damage" clauses have been upheld by both the supreme court[8] and most recently by the court of appeals.[9]

The enforcement of such "no damage" provisions, however, raises serious policy questions. First, there is potential for an oppressive "adhesion" contract[10] in which a contractor is forced to bear broad liability for unforeseeable delay costs arising from negligent or unreasonable acts of the owner. Whether the clause was actually bargained

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tional costs, expenses, overhead or profit or other compensation.

. . . .

.2 *Change Orders*

. . . .

.4 *Causes beyond the control of the contractor* . . . .

Id. at 706–07, 566 P.2d at 562 (emphasis in original).

6. Cases upholding the validity of "no damage" clauses include W.C. James, Inc. v. Phillips Petroleum Co., 485 F.2d 22 (10th Cir. 1973) (apparently applying Colorado law to uphold a "no damage" clause where the delays involved were relatively minor and the claim may have been devised mostly as an "afterthought"); F.D. Rich Co. v. Wilmington Hous. Auth., 392 F.2d 841 (3d Cir. 1968) (upholding a "no damage" provision under Delaware law); Lichter v. Mellon-Stuart Co., 305 F.2d 216 (3d Cir. 1962) (upholding a "no damage" provision, apparently under Pennsylvania law, where the subcontractor was unable to sufficiently tie its damages to delays by the prime contractor); Peter Kiewit Sons' Co. v. Iowa S. Utils. Co., 355 F. Supp. 376 (S.D. Iowa 1973) (upheld "no damage" provision under Iowa law, but purported to construe it narrowly); Hallett Constr. Co. v. Iowa State Highway Comm'n, 261 Iowa 290, 154 N.W.2d 71 (1967) ("no damage" clauses strictly construed and not enforced when delay resulted from fraud or active interference by party seeking the benefit thereof); E.M. Freeman v. Department of Highways, 253 La. 105, 217 So. 2d 166 (1968); Wes-Julian Constr. Corp. v. Commonwealth, 351 Mass. 588, 223 N.E.2d 72 (1967); St. Germain & Son, Inc. v. Taunton Redev. Auth., 340 N.E.2d 916 (Mass. App. Ct. 1976) (dictum); Siefford v. Housing Auth., 192 Neb. 643, 223 N.W.2d 816 (1974); Ace Stone, Inc. v. Township of Wayne, 47 N.J. 431, 221 A.2d 515 (1966) (dictum); A. Kaplen & Son, Ltd. v. Housing Auth., 42 N.J. Super. 230, 126 A.2d 13 (1956); Peckham Road Co. v. State, 32 App. Div. 2d 139, 300 N.Y.S.2d 174 (1969), *aff'd*, 28 N.Y.2d 734, 269 N.E.2d 826, 321 N.Y.S.2d 117 (1971). *See* J. SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 458 (1970); Annot., 74 A.L.R.3d 187, 203 & n.63 (1976) ("no damage" clauses are generally held or recognized to be valid).

7. In this comment, decisions of the Washington courts are often drawn upon for illustrative purposes, but the essential principles of argument presented are of broad applicability in the various jurisdictions where "no damage" clauses are upheld.

8. *E.g.*, Ericksen v. Edmonds School Dist. No. 15, 13 Wn. 2d 398, 125 P.2d 275 (1942) ("no damage" clause effectively barred contractor's claim for damages resulting from owner's hindrances and delays).

9. "No damage" clauses were held effective to bar contractor's recovery of impact damages. Nelse Mortensen & Co. v. Group Health Coop., 17 Wn. App. 703, 566 P.2d 560 (1977); Rowland Constr. Co. v. Beall Pipe & Tank Corp., 14 Wn. App. 297, 540 P.2d 912 (1975).

10. *See generally* Duncan, *Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code*, 34 LA. L. REV. 1081 (1974); note 45 *infra*.

for becomes an issue in this context, as does the question of unconscionability.[11] In addition, it is doubtful whether the enforcement of "no damage" clauses is consistent with the fundamental principles of law governing analogous liquidated damage provisions.[12] The issue here is whether a "no damage" clause functions in effect as a liquidated damage provision, and if so, whether the former ought not be governed by the same legal tests for enforceability which apply to the latter.

This comment concludes that "no damage" clauses should not be enforced because they are generally imposed without genuine bargaining and they tend to work oppressive results on a contractor by subjecting it to a risk of substantial and unforeseeable liability for damages arising from delays attributable to the owner. An analogy to the law of liquidated damages provides a useful illustration of the type of inequity which is promoted by enforcing "no damage" provisions, as well as a doctrinal basis for holding such clauses invalid.

I. TYPICAL APPLICATIONS OF "NO DAMAGE" CLAUSES

The effect of a "no damage" clause is to preclude the contractor's recovery of "impact damages,"[13] defined as those indirect costs aris-

11. *See* note 44 *infra* for a discussion of the potential application by analogy of the rule of unconscionability as embodied in the Uniform Commercial Code.

12. *See* RESTATEMENT OF CONTRACTS § 339 (1932), *quoted at* text accompanying note 92 *infra*.

13. Also known as "impact delay damages," "ripple damages," or generally as a component of indirect costs. Corbin explains impact damages as follows:

> The building contractor's claim for damages may be based in part on losses due to the owner's causing unreasonable delay in completion. The contractor's machinery and labor force may have been kept idle, when but for the delay they would have been income producing. . . . It is proper to admit expert testimony as to the rental value of machinery, the extra amounts paid to hold the labor force together, and also a reasonable proportion of overhead costs fairly chargeable to this job during the delay.

5 A. CORBIN, CONTRACTS § 1094, at 513–14 (1964). There have been many decisions recognizing and awarding impact damages. *E.g.*, Morrison-Knudsen Co. v. United States, 397 F.2d 826 (Ct. Cl. 1968) (per curiam) (contractor recovered mobilization and demobilization costs, plus equipment ownership and maintenance costs during storage necessitated by changed site condition); Laburnum Constr. Corp. v. United States, 325 F.2d 451 (Ct. Cl. 1963) (contractor recovered impact damages arising from defective specifications and delays in approving redesign, attributable to Government-owner); Fischbach & Moore Int'l Corp., ASBCA No. 18,146, 77–1 BCA ¶12,300, at 59,204 (1976) (impact damages arising from interference with orderly work sequence of a transmission line recovered by contractor); Coley Properties Corp., PSBCA No. 291, 75–2 BCA ¶ 11,514, at 54,916 (1975) (granted recovery of

ing from changes or delays in the normal anticipated schedule of progress. In other words, a change or delay in one part of a project may impact on other parts of the work, delaying them or rendering them otherwise more difficult or costly by dislocating them from their planned sequence.[14] Such impact damages, the recovery of which is precluded by a "no damage" provision, are generally recognized as a genuine and significant element of the increased costs which arise from changes or delays on a construction project.[15] The function of a "no damage" clause with respect to such impact costs is best understood by considering several of the numerous situations in which the clause may come into play.

A. Changes or Errors in Specifications

In a standard construction contract, there are a number of ways in which the planned progress of the contractor's work may be dependent upon the competent and timely performance of certain obligations assigned to the owner. In particular, the contractor may rely on specifications and drawings which are provided by the owner as a basis for the contractor's bid.[16] Thus, subsequent changes in these instructions may dislocate the contractor's work from its planned sequence.

First, the owner may decide to alter portions of the work, a prerogative generally reserved to it under a standard Changes Clause.[17] Sec-

increased costs incurred attributable to delay by Government-owner which reduced efficiency and interrupted work sequence); City of Seattle v. Dyad Constr., Inc., 17 Wn. App. 501, 565 P.2d 423 (1977) (awarding impact damages despite "no damage" clause, when owner's actions "demolished" contractor's cost and time structures).

See J. PAUL, UNITED STATES GOVERNMENT CONTRACTS & SUBCONTRACTS 343–44 (1964); J. SWEET, *supra* note 6, at 458; Roesler, *Recovery of Impact Costs Under the Pre-1968 Changed Conditions Clause,* 31 FED. B.J. 327, 331–32 (1972).

14. In order for a contractor more accurately to compute its bid, it must plan a schedule of anticipated work progress, focusing on those critical elements of work, the delay of which will affect overall job completion time. On major contracts, a contractor is often required to submit its planned sequence of operations in advance to the owner, recorded by "Critical Path Method" (CPM). *See generally* Wickwire & Smith, *The Use of Critical Path Method Techniques in Contract Claims,* 7 PUB. CONT. L.J. 1 (1974).

15. *See* note 13 *supra.*

16. *See, e.g.,* cases cited at notes 108–10 *infra.*

17. The standard federal Changes Clause is reprinted at 41 C.F.R. § 1–7.602–3 (1977). A recent Washington case contained the following example of a Changes Clause: *"The owner, without invalidating the contract, may order changes in the work* within the general scope of the contract consisting of additions, deletions or other revisions, *the contract sum and the contract time being adjusted accordingly."* Nelse

ond, some error or omission in the specifications or contract drawings may become apparent in the field, requiring redesign or the use of alternate work methods.[18] Finally, the drawings may indicate sources of material (*e.g.*,"borrow pits" for earthmoving work) which in fact yield none or far less than what is represented to the bidders.[19]

B. Owner's Duties To Obtain Permits or Issue Intermediate Approvals

A contract may assign to the owner a duty to obtain certain governmental building or development permits which authorize the contractor to proceed.[20] In addition, the contractor may be required to obtain intermediate approvals or "go-aheads" from the owner before proceeding at certain designated stages of the work.[21] For example, the owner's approval might be required before the contractor may proceed from the foundation to the superstructure of a building (*e.g.*, to permit owner's inspection). Alternately, an owner's design team may delay approval of redesign work necessitated by the owner's own specification errors, changed site conditions, or discretionary changes under the Changes Clause.[22] Any delay on the part of the owner in issuing or in obtaining necessary permits and authorizations may di-

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Mortensen & Co. v. Group Health Coop., 17 Wn. App. 703, 708, 566 P.2d 560, 563 (1977) (italics in original). In *Nelse Mortensen*, as is typical, the contract adjustment provided was limited to direct costs of additional labor and materials attributable to the owner's changes, plus a fixed percentage for profit and overhead on these items. Recovery of impact damages was elsewhere expressly precluded by a "no damage" clause. *See* note 5 *supra*.

18. *E.g.*, Laburnum Constr. Corp. v. United States, 325 F.2d 451 (Ct. Cl. 1963) (erroneous specifications required time-consuming redesign work).

19. *See, e.g.*, Morrison-Knudsen Co. v. United States, 397 F.2d 826 (Ct. Cl. 1968) (quantity of material in designated "borrow pits" far underran that represented in contract documents).

20. *See, e.g.*, Leonard Pevar Co., PSBCA No. 219, 77–2 BCA ¶ 12,690, at 61,578 (1977) (when Government had duty to secure approval of subdivision plan, its delay in so doing rendered it liable to contractor for consequent increased performance costs); Bulley & Andrews, Inc. v. Symons Corp., 25 Ill. App. 3d 696, 323 N.E.2d 806 (1975) (owner liable to contractor for damages arising from owner-caused delay in issuance of necessary building permits).

21. *E.g.*, Charles H. Berry, Gen. Contr. Inc., DOT CAB No. 67–47, 69–2 BCA ¶ 7775, at 36,094 (1969) (contractor relieved of late performance damages for delays in Government's approval of contractor's shop drawings). *Cf.* Hardie-Tynes Mfg. Co., ASBCA No. 20,582 76–2 BCA ¶ 11,972, at 57,377 (1976) (contractor recovered damages arising from Government's failure to either approve or disapprove an alternate construction method submitted by contractor).

22. *E.g.*, Laburnum Constr. Corp. v. United States, 325 F.2d 451 (Ct. Cl. 1963).

rectly delay the contractor's project completion by dislocating work from its planned sequence.

C. *Owner's Duty To Coordinate Independent Contractors*

Finally, in the case of a subcontractor, or a prime contractor in a "multi-prime" contract,[23] a bidder may reasonably assume certain customary rates of progress on the part of other contracting parties working independently for the owner on the same project, in order to schedule its own work in anticipated coordination therewith.[24] When the owner undertakes this duty to coordinate the various contractors, and a contractor relies upon it, the owner's failure to perform its obligation may lead to disruption of the contractor's planned work schedule, prepared in reliance on the orderly progress of other independent contractors.

D. *Typical Impact Damages*

Any of the events outlined above could delay a contractor's progress, particularly if the segments of work delayed were on the contractor's Critical Path.[25] Although a standard Changes Clause provides for compensating the contractor for the increases in material and labor costs which are directly attributable to the work changed by the owner, the contractor is likely to incur significant additional damages due to the impact of such changes in holding up other segments of its work which were not directly changed. Such impact damages may arise when a contractor's heavy equipment must stand idle or in stor-

23. The term "multi-prime" is used here to designate a contract in which more than one contractor contracts directly with the owner. It is more common for an owner to contract with a single prime contractor, which then undertakes to engage and coordinate the various subcontractors required on the job. Under a multi-prime contract, however, each prime contractor may have to rely on the owner to coordinate other prime contractors in order to maintain efficient progress on the overall project.

24. In preparing its work-progress schedule, either each contractor may assume that other independent contractors on the job will progress at a rate customary in the industry, or the contract may specify deadlines for the completion of various segments of work, by which each contractor can measure the anticipated progress of each other contractor. *See* Shalman v. Board of Educ., 31 App. Div. 2d 338, 297 N.Y.S.2d 1000 (1969) (owner impliedly agreed that contractor would not be unreasonably delayed by failure of other contractors to complete work which was essential to performance of work in question, and for breach of that duty contractor may recover its resulting damages from the owner).

25. *See* note 14 *supra*.

age while the project is delayed. Work crews may also lose efficiency by having to work around the areas being delayed. Lengthy delays may require that workers be laid off and replaced at a later time by new crews in need of additional training. Work may also be pushed by delays into seasons of adverse weather or into periods of strikes and expiring labor contracts, all of which could result in significant overall cost increases to the contractor. To the extent that a "no damage" clause is enforced, it operates to bar recovery by a contractor of impact damages such as these.

II. FUNDAMENTAL EQUITIES AND THE RATIONALES BEHIND ENFORCEMENT

A. General Grounds for and Effect of Enforcement

At least in the absence of a "no damage" clause or similar exculpatory provision, it is generally accepted that when a contractor is unreasonably delayed in the performance of its contract by the acts or omissions of the owner, the contractor may recover its full impact damages arising from the delay.[26] These damages may be recovered on the basis of breach of the owner's implied duty not to hinder the contractor[27] or for breach of the owner's implied warranty of specifications.[28] Alternately, a court may award impact damages on the basis of the strong policy of compensation for changes which the court of claims has found to underlie the standard Changes Clause in the contract.[29]

26. *See, e.g.*, McDaniel v. Ashton-Mardian Co., 357 F.2d 511 (9th Cir. 1966) (dictum) (contractor delayed in its work through no fault of its own but by virtue of wrongful act of other contracting party is entitled to damages); Wes-Julian Constr. Corp. v. Commonwealth, 351 Mass. 588, 223 N.E.2d 72 (1967) (dictum) (in absence of specific contract provision to the contrary, owner would be bound to refrain from delaying contractor's work, and contractor could recover for breach of contract for such delays). In Ericksen v. Edmonds School Dist. No. 15, 13 Wn. 2d 398, 125 P.2d 275 (1942) (dictum), the court stated:

> It is undoubtedly the rule in this state, as well as in other states generally, that, in the absence of any provision in the contract to the contrary, a building or construction contractor who has been delayed in the performance of his contract may recover from the owner of the building damages for such delay if caused by the default of the owner.

Id. at 408, 125 P.2d at 279.

27. *See* notes 99–101 and accompanying text *infra*.

28. *See* notes 107–11 and accompanying text *infra*.

29. The court of claims, in Morrison-Knudsen Co. v. United States, 397 F.2d 826 (Ct. Cl. 1968), declined to enforce an exculpatory provision which conflicted with

When a "no damage" clause is included in a contract, however, it is generally enforced to eliminate the contractor's right to recover impact damages.[30] The fundamental reasoning behind giving such effect to a "no damage" clause is the judicial presumption that a construction contract and all its provisions are bargained for at arm's length,[31] that they therefore represent the complete manifested intent of the contracting parties,[32] and that a contractor can protect itself against impact damages by including an appropriate contingency for them in its bid.[33] In addition, it is sometimes argued that "no damage" clauses serve a public interest by protecting owners who are bound by fixed appropriations against vexatious litigation.[34]

B. Exceptions to Enforcement

At the same time, it is generally acknowledged that there are certain limitations on the freedom of contract presumptions which usually underlie the enforcement of "no damage" provisions. In their treatise on government contracts, McBride and Wachtel summarize these limitations as follows:

> The clause will not be enforced if the delay:
> 1) Was of a kind not contemplated by the parties.
> 2) Amounted to an abandonment of the contract.
> 3) Was caused by bad faith.
> 4) Was caused by active interference.[35]

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the principles of reasonable compensation which it found to underlie the federal Changes Clause:

> We have repeatedly indicated that, where [a Changes Clause] (or a comparable) clause is contained in a contract, the court will construe the agreement, to the extent it is fairly possible to do so, so as not to eliminate the standard article or deprive it of most of its ordinary coverage.

Id. at 829. *See* note 17 *supra*.

30. *See* cases cited at note 6 *supra*.

31. "Based upon the assumption that mature persons dealing at arm's length are capable of writing their own contracts, no damage clauses are interpreted strictly in accord with their manifested intent." J. MCBRIDE & I. WACHTEL, *supra* note 2, § 32.10[5].

32. *Id. E.g.*, Ace Stone, Inc. v. Township of Wayne, 47 N.J. 431, 221 A.2d 515 (1966) (parties clearly contemplate that contractor will bear risks of ordinary and usual types of delay incident to progress and completion); Nelse Mortensen & Co. v. Group Health Coop., 17 Wn. App. 703, 566 P.2d 560 (1977) ("no damage" clause was intended to foreclose damage claims based on owner-caused delay).

33. *E.g.*, A. Kaplen & Son, Ltd. v. Housing Auth., 42 N.J. Super. 230, 126 A.2d 13 (1956) (when "no damage" clause is included in contract, bidders presumably weigh the risk of owner-caused delays in calculating their bids).

34. *See* note 70 and accompanying text *infra*.

35. J. MCBRIDE & I. WACHTEL, *supra* note 2, § 32.10[5].

These exceptions to the general rule of enforceability have been given at least nominal recognition by a number of courts,[36] often with express acknowledgement of the potential for harsh results which may result from literal enforcement of "no damage" provisions.[37] Of these exceptions, the first is most significant, in part because it essentially comprehends all four limitations in a single statement. Its consistent application would require that courts apply a test of foreseeability before barring a contractor's recovery of impact costs.

There are, however, at least two significant problems with the McBride and Wachtel formulation. First, the "contemplation of the parties" limitation to the clause's enforcement is not consistently applied by the courts.[38] The tendency too often is to uphold the clause without serious inquiry into the extent to which the damages suffered were actually foreseeable at the time of the contractor's bid.[39]

Second, characterizing McBride and Wachtel's four situations as "exceptions" to enforcement promotes a misleading conclusion by negative implication. Stating that a "no damage" clause will not be enforced if the delay *is not* of a kind contemplated by the parties implies that the clause will have some operative effect if the delay *is* of a

36. A number of courts have conceded that these exceptions limit the enforceability of a "no damage" clause, although concluding that none of them happen to apply in the case at hand. *See, e.g.,* E.C. Ernst Inc. v. Manhattan Constr. Co., 551 F.2d 1026 (5th Cir. 1977); F.D. Rich Co. v. Wilmington Hous. Auth., 392 F.2d 841 (3d Cir. 1968); Peter Kiewit Sons' Co. v. Iowa S. Utils. Co., 355 F. Supp. 376 (S.D. Iowa 1973); Western Eng'rs, Inc. v. State Rd. Comm'n, 20 Utah 2d 294, 437 P.2d 216 (1968).

37. *See, e.g.,* Ozark Dam Constructors v. United States, 127 F. Supp. 187, 190 (1955) ("a contract for immunity from harmful consequences of one's own negligence always presents a serious question of public policy"); Hallett Constr. Co. v. Iowa State Highway Comm'n, 261 Iowa 290, 154 N.W.2d 71 (1967) ("no damage" clause strictly construed due to harsh results often induced thereby); Vanderlinde Elec. Corp. v. City of Rochester, 54 App. Div. 2d 155, 388 N.Y.S.2d 388 (1976) ("no damage" clause construed strictly); Ericksen v. Edmonds School Dist. No. 15, 13 Wn. 2d 398, 125 P.2d 275 (1942) (such preclusive provisions as a "no damage" clause given strict construction because of harsh results which may flow from enforcement thereof). *See also* Sweet, *Owner-Architect-Contractor: Another Eternal Triangle,* 47 CALIF. L. REV. 645, 681 (1959) (exceptions to the enforcement of "no damage" clauses arise from equities on the part of the contractor).

38. *See, e.g.,* Wes-Julian Constr. Corp. v. Commonwealth, 351 Mass. 588, 223 N.E.2d 72 (1967) ("no damage" clause held effective to bar contractor's recovery of "impact damages," even when such damages are attributable to the negligent, unreasonable, or arbitrary and capricious conduct of the owner); Western Eng'rs, Inc. v. State Rd. Comm'n, 20 Utah 2d 294, 437 P.2d 216 (1968) ("no damage" clause is included to protect the owner with regard to unforeseen delays); Nelse Mortensen & Co. v. Group Health Coop., 17 Wn. App. 703, 566 P.2d 560 (1977) ("no damage" clause held effective to bar contractor's recovery of damages for unforeseeable owner-caused delay).

39. *See* note 69 and accompanying text *infra.*

kind contemplated by the parties.[40] In fact, however, a "no damage" clause has no operative effect with respect to "delays"[41] which are within the reasonable contemplation of the contracting parties. Where "delays" are foreseeable, a contractor is generally required to anticipate them and their cost impact in preparing its bid.[42] Thus, whether or not the contract contains a "no damage" clause, the contractor has no right to recover additional compensation for the impact costs attributable to foreseeable "delays." Only when the delays attributable to the owner are unforeseeable may a contractor ordinarily recover impact damages, and it is therefore only in this case that a "no damage" clause, by barring the contractor's recovery, causes a different result than that which would obtain in its absence. In short, the sole operative effect of an enforced "no damage" clause is to bar a contractor's recovery of impact damages arising from unforeseeable owner-caused delays. It follows that if the exception were consistently applied and courts refused to enforce "no damage" clauses whenever the delays involved were beyond the contemplation of the contracting parties, such clauses would have *no* operative effect.[43]

What, then, are the legal grounds upon which the enforcement of the clause might be attacked? To begin with, when the effect of a "no damage" clause is to impose such an unreasonable liability on the contractor as to be oppressive, a court might by analogy invoke the rule against unconscionability, as embodied in section 2–302 of the Uniform Commercial Code.[44] Second, a court might invoke the gen-

40. The notion that "no damage" clauses have operative effect with respect to foreseeable "delays" appears to underlie one New Jersey decision: "Where parties enter into a construction contract with a customary no-damage clause they clearly contemplate . . . that the contractor himself will bear the risks of the 'ordinary and usual types of delay' incident to the progress and completion of the work." Ace Stone, Inc. v. Township of Wayne, 47 N.J. 431, 221 A.2d 515, 519 (1966) (quoting Gherardi v. Board of Educ., 53 N.J. Super. 349, 365, 147 A.2d 535, 544 (1958)).

41. *See* note 60 and accompanying text *infra.*

42. *See* notes 61–66 and accompanying text *infra.*

43. Where the foreseeability rule is consistently applied to deny enforcement to a "no damage" clause, the court has gone beyond the notion of strict construction to avoid harsh results. *See* note 37 and accompanying text *supra.* Such a rule in fact eliminates the entire operative effect of the clause, and a court ought to acknowledge this necessary conclusion rather than attempting to cloak its decision in the guise of narrow construction.

44. An analogy to the rule of unconscionability, as embodied in § 2–302 of the Uniform Commercial Code, provides an unexplored basis for finding harsh results in the enforcement of "no damage" clauses. This equitable doctrine is applied to deny enforcement to any contract or contract provision which was unconscionable at the time it was made. Although Official Comment 1 to § 2–302 describes its purpose as "the prevention of oppression and unfair surprise" rather than the "disturbance of

eral rule that a contract or contract term shall not be enforced if it places one contracting party at the mercy of another.[45] Finally, a "no damage" provision may be challenged on the ground that, in the absence of actual bargaining, it imposes on a contractor liability for impact damages not within the contemplation of the parties. The following discussion will focus on this third argument.[46]

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allocation of risks because of superior bargaining power," it seems self-evident that an oppressive term could be inserted in a contract as a result of disparity in bargaining power. U.C.C. § 2–302, Official Comment 1. *See* Shedd, *Unconscionability in Contracts,* GOV'T CONTRACTOR BRIEFING PAPER, June 1975, at 3 ("oppression" and "inequality of bargaining position" are listed together as a single aspect of procedural unconscionability). A number of cases further support the proposition that inequality of bargaining power is an important element of an unconscionability determination. *See* J. CALAMARI & J. PERILLO, CONTRACTS § 9–40, at 326 & n.48 (2d ed. 1977) (citing Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971)); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 4–6, at 125 & n.66 (1972) (discussion of Hult Chevrolet, Inc. v. Meier, 2 Pov. L. REP. (CCH) ¶ 10,283 (Wis. Cir. Ct. 1969)). In *Hult Chevrolet,* the court dismissed a car dealer's action to recover liquidated damages for nonacceptance, amounting to 20% of the contract price. White and Summers point out that: "Among other things, the court found that the liquidated damages clause was unconscionable under section 2–302 because the parties had unequal bargaining power arising from the fact that most car dealers impose similar clauses and thus eliminate the buyer's freedom of choice." J. WHITE & R. SUMMERS, *supra* at 125. Similarly, in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), an installment payment contract by which the seller retained a security interest in all items purchased until the entire aggregate bill was paid up raised a question of unconscionability. Judge Skelly Wright wrote the following in connection with § 2–302: "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of the parties together with contract terms which are unreasonably favorable to the other party." *Id.* at 449.

Both the *Hult Chevrolet* and *Williams* decisions recognized that unconscionability, as treated in U.C.C. § 2–302, may arise when an oppressive contract term is imposed by a contracting party with bargaining power significantly superior to that of another. The very nature of the competitively bid contracting process suggests the same possibility with respect to "no damage" clauses. When such exculpatory provisions are commonly included and enforced, a contractor may lose its freedom to choose which contracts to bid on, being in effect compelled to accept a contract with a "no damage" clause or forego bidding on a significant amount of prospective work. Particularly in light of the broad, uncertain, and thus potentially oppressive liability thereby imposed on a contractor for delay damages attributable to the owner, it seems reasonable to inquire into the possibilities of unconscionability arising from wide disparities in the parties' bargaining power.

45. "Sometimes a party will use its superior bargaining power to include in a contract a clause holding it harmless from liability simply to avoid the expense of a potential loss." Maurer, *Architects, Engineers and Hold Harmless Clauses,* INS. L.J. 725, 732 (1976). Dean Prosser has written of such contract terms: "The courts have refused to uphold such agreements, however, where one party is at such obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence." W. PROSSER, LAW OF TORTS § 68, at 442 (4th ed. 1971). *See also* Tibbetts Contracting Corp. v. O & E Contracting Co., 15 N.Y.2d 324, 206 N.E.2d 340, 258 N.Y.S.2d 400 (1965) (language in contracts placing one party at the mercy of the other is not favored by the courts; literal absolutism is not supported by the decisions).

46. All three suggested bases for attacking a "no damage" clause have merit. Among these distinct though related principles, however, only the third has had sub-

C. *Absence of Genuine Bargain*

Because a "no damage" clause has the potential for imposing a harsh or oppressive liability on a contractor for delay damages attributable to the owner, it is appropriate to inquire into the validity of a judicial conclusion that the clause was incorporated into the contract by a process of bargaining at arm's length. Is it fair to characterize the process of competitive bidding[47] as a true bargaining situation?

When a project is advertised, a contractor may not generally negotiate with regard to the specific terms of the contract. He must either submit a bid on the contract as offered to the public or simply refrain from bidding. In this situation, it is the owner who generally has the superior bargaining position.[48] This tends to undermine the "freedom of contract" premises[49] upon which the enforcement of "no damage" clauses often rests. Of course, it might be argued that a contractor can always go elsewhere and bid on work which is advertised with more favorable contract terms, but where exculpatory provisions such as "no damage" clauses are commonly in use and held valid, it may become difficult to obtain sufficient contract work not imposing such conditions.

It has also been suggested that, in effect, a contractor is bargaining when it foregoes its right to recover impact damages in exchange for a right to a time extension equal in length to the period of delay attributable to the owner.[50] Properly, however, the granting of a time ex-

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stantial application in the construction context. *See* cases cited at notes 59 & 69 *infra*. As a result, courts will probably look most favorably upon the "contemplation of the parties" test as a basis for denying enforcement to a "no damage" clause. *See* notes 35 & 36 *supra*.

47. Most construction contracts are awarded through the use of competitive bidding rather than by negotiation. J. SWEET, *supra* note 6, at 323. In the case of government contracts, this is often done pursuant to statutory mandate. *E.g.*, 41 U.S.C. § 5 (Supp. V. 1975); WASH. REV. CODE § 35.23.352 (1976). *See* Peckar, *Liquidated Damages in Federal Construction Contracts: Time for a New Approach*, 5 PUB. CONT. L.J. 129, 132 (1972) (in federal construction contracting, negotiation of contract terms is a rare occurrence).

48. *See* Sweet, *Liquidated Damages in California*, 60 CALIF. L. REV. 84, 117 (1972).

49. *See* J. SWEET, *supra* note 6, at 20–21:

> [F]reedom of contract assumes two parties of relatively equal bargaining power who jointly negotiate an agreement. Through the development of mass produced contracts and the emergence of large blocs of economic power, this earlier model of the negotiated contract has become the exception. If the state, through its courts, enforces "adhesion" contracts (contracts presented on a "take it or leave it" basis), the state is according almost sovereign power to those who have the economic power to dictate contract terms.

50. *See, e.g.*, S.L. Rowland Constr. Co. v. Beall Pipe & Tank Corp., 14 Wn. App. 297, 540 P.2d 912 (1975): "Under a provision in a construction contract by

tension for owner-caused delay is not a remedy[51] because the contractor's otherwise-existing right to impact damages remains uncompensated.[52] Rather, such a "grant" is no more than the owner's forbearance from attempting to collect late performance damages based on owner-caused delays. Yet it is a generally accepted principle of law that a party delaying the performance of a contract may not, even in the absence of an express term granting a time extension, charge the contractor with time damages for consequent delay.[53] Therefore, the granting of a time extension for owner-caused delay is at best an illusory consideration for a contractor's relinquishing its right to recover damages under a contract containing a "no damage" clause. Here, there is no quid pro quo, and there is no true bargain.

D. Foreseeability and Intent of the Parties

When the respective bargaining positions of the parties to a competitively bid construction contract are sufficiently disparate to warrant some scrutiny of the owner's efforts to exculpate itself from liability for damages arising from its own actions, the inquiry must proceed to those aspects of a "no damage" clause which indicate whether it in fact reflects the intent of the contracting parties. The key to ascertaining intent is the unforeseeable nature and scope of impact damages attributable to the owner.

The first limitation on the enforcement of a "no damage" clause in the McBride and Wachtel formulation[54] reflects a basic principle of

which the contractor specifically waived claims for damages for any hindrance or delay *and in lieu thereof was granted* extensions of time, the contractor was barred from recovering damages for delays caused by plan changes made by the municipality." *Id.* at 305, 540 P.2d at 918 (emphasis added).

51. BLACK'S LAW DICTIONARY 1457 (4th ed. 1951) defines "remedy" as: "The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated."

52. References to the contractor's actions for breach of contract which would lie absent an enforced "no damage" provision are contained in notes 26–28 and accompanying text *supra*.

53. *E.g.*, Glassman Constr. Co. v. Maryland City Plaza, Inc., 371 F. Supp. 1154 (D. Md. 1974); Yukon Serv., Inc., AGBCA No. 213, 74–2 BCA ¶ 10,684, at 50,821 (1974); Gamm Constr. Co. v Townsend, 32 Ill. App. 3d 848, 336 N.E.2d 592 (1975); G. Salvaggio & Co. v. Delta Heights, Inc., 277 So. 2d 754 (La. Ct. of App. 1973); Southwest Eng'r Co. v. Reorganized School Dist. R–9, 434 S.W.2d 743 (Mo. Ct. App. 1968) (dictum); Fifty States Management Corp. v. Niagara Permanent Sav. & Loan Ass'n, 58 App. Div. 2d 177, 396 N.Y.S.2d 925 (1977); Lovric v. Dunatov, 18 Wn. App. 274, 567 P.2d 678 (1977).

54. *See* J. MCBRIDE & I. WACHTEL, *supra* note 2, § 32.10[5]; text accompanying note 35 *supra*.

contract law—parties to a contract ought not be held liable for damages beyond their contemplation when the agreement was made.[55] This is closely allied to the general rule that a contract will be interpreted so as to conform to the manifested intent of the parties.

When a "no damage" clause is challenged in litigation, many courts purport to avoid the harsh results of unforeseeability by construing the clause narrowly.[56] The Utah Supreme Court, for example, has indicated that a "no damage" clause might be ineffective to bar a contractor's recovery of damages for delays "not within the specifically enumerated delays to which the no damage clause is to apply."[57] Other decisions, particularly in Washington, have turned on whether the time extension provided in case of owner-caused delay was expressly designated as the contractor's sole remedy.[58] The problem with such mechanical tests is that they tend to narrow the scope of judicial inquiry to the form of the clause, which may distract the court from the more important questions of unequal bargaining power, potential unconscionability, and the foreseeability of impact damages. In other words, the validity of the exculpatory clause ought to turn upon the underlying equity of its enforcement and not merely upon the drafting skills of the parties.[59]

55. *See* cases cited at note 36 *supra*. *See generally* Globe Ref. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544 (1903) (a person can be held responsible only for the consequences of breach which were reasonably within the contemplation of the parties when the contract was made); Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854); RESTATEMENT OF CONTRACTS § 329, Comment a (1932) (in breach, one party should not be charged with damages for harms which it had no sufficient reason to foresee when it made the contract).

56. *See* note 37 and accompanying text *supra*.

57. Western Eng'rs, Inc. v. State Rd. Comm'n, 20 Utah 2d 294, 437 P.2d 216, 217 (1968) (dictum).

58. *E.g.*, Peter Kiewit Sons' Co. v. Iowa S. Utils. Co., 355 F. Supp. 376, 396 (S.D. Iowa 1973) ("It is well recognized that when the language contained in no damage clauses, is clear and without ambiguity, such clauses will be regarded as valid, and enforced according to their terms."); Michel & Pfeffer v. Oceanside Properties, Inc., 61 Cal. App. 3d 433, 132 Cal. Rptr. 179, 184 (1976) ("no damage" clause clearly indicates intent of parties to make extension of time the exclusive remedy for delay); Ericksen v. Edmonds School Dist. No. 15, 13 Wn. 2d 398, 409, 125 P.2d 275, 280 (1942) ("Where . . . the contract expressly precludes the recovery of damages by the contractor for delay caused by the default of the owner, that provision will be given full effect."). *Cf.* V.C. Edwards Contracting Co. v. Port of Tacoma, 83 Wn. 2d 7, 514 P.2d 1381 (1973) (only after determining that the "no damage" clause was not specific enough to effectively preclude recovery of owner-caused impact damages did the court give consideration to the fact that the delays attributable to the owner were beyond the contemplation of the parties when the contract was made). *See also* S.L. Rowland Constr. Co. v. Beall Pipe & Tank Corp., 14 Wn. App. 297, 540 P.2d 912 (1975).

59. *See* Hawley v. Orange County Flood Control Dist., 211 Cal. App. 2d 708,

How, then, ought the foreseeability test be applied to the enforceability of a "no damage" clause? In order to adjudge the contractor's right to recovery in light of the parties' intent, one must first determine the types of "delays"[60] which may be characterized as foreseeable, and for which a contractor has no right to additional compensation from the owner. The presumption is that a competent contractor should anticipate such "delays" and provide for them in its bid.

Foreseeable "delays" might include routine periods of time required for the owner to respond to the contractor's requests for engineering information.[61] The slowdown effects of normal winter weather must also be anticipated when a contract is planned to run through that period.[62] In addition, a minimal percentage of error in drawings or specifications and the delay impact of such errors may in some cases be foreseeable.[63]

These periods of reasonable (or foreseeable) "delay" may arise as an implied term of the contract, based on custom or general experience in the industry.[64] Alternately, they may be specified by express provision of the contract.[65] In either case, the significant characteris-

27 Cal. Rptr. 478 (1963) (valid "no damage" clause did not foreclose court from weighing and considering all facts relevant to determine whether parties actually contemplated that the clause would preclude contractor from recovering for damages caused by owner's unreasonable delay in furnishing revised plans).

60. Such "delays" might more accurately be characterized simply as "periods of waiting," because anticipated waiting periods do not actually *delay* a contractor's planned work schedule, which has presumably made allowance therefor. Nonetheless, the designation "delays" will be used for symmetry: to contrast foreseeable "delays" with unforeseeable delays.

61. *See, e.g.,* cases cited at note 86 *infra.*

62. *See, e.g.,* Constructora Pan-Caribe, S.A., ENG. BCA No. PCC–18, 73–2 BCA ¶ 10,238, at 48,257 (1973) (17 of the contractor's 34 days of rain-related delay were foreseeable and thus noncompensable). *See also* GOV'T CONTRACTOR, Apr. 1, 1974, ¶ 120 (an example of a foreseeable event is delay due to the effect of normal weather).

63. In federal construction contracts, however, the rule has been that all delay due to defective or erroneous Government specifications is deemed unreasonable and hence compensable. *See, e.g.,* Chaney & James Constr. Co. v. United States, 421 F.2d 728 (Ct. Cl. 1970). However, the portion of the contract documents representing site conditions to the bidder might be expected to contain a certain minimal percentage of error. *See, e.g.,* Morrison-Knudsen Co. v. United States, 397 F.2d 826 (Ct. Cl. 1968) (it was reasonably foreseeable that a certain percentage of borrow pits would fail).

64. *See, e.g.,* Hardie-Tynes Mfg. Co., ASBCA No. 20,582, 76–2 BCA ¶ 11,972, at 57,377 (1976) (court determined reasonable owner delays as an implied term of the contract).

65. *See, e.g.,* Nelse Mortensen & Co. v. Group Health Coop., 17 Wn. App. 703, 566 P.2d 560 (1977) (contract included a 15-day schedule of reasonableness within which architect was to provide interpretations requested by contractor).

tic of these "delays" is that they are subject to reasonable estimation at the time the contractor submits its bid.[66]

It is when the actual changes and delays attributable to the owner exceed these customary tolerances that they become unforeseeable, and it is here that a "no damage" clause may force a contractor to bear liability for owner-caused impact damages which the contractor could not reasonably anticipate in its bid. In such a case, it is not reasonable to conclude that the parties intended that the "no damage" clause would operate to bar the contractor's recovery, and the recognized rule of denying enforcement to the clause with respect to delays beyond the contemplation of the parties should apply.[67]

It should be emphasized that both the nature and extent of owner-caused delays may be unforeseeable. Delays which quantitatively ex-

66. It follows that those potential delays which can reasonably be foreseen, either on the basis of the contractor's experience or on the basis of an express contract term, may be calculated with sufficient accuracy to make feasible a provision therefor in the contractor's bid. The contractor need not fear losing its competitive edge in such situations, since the foreseeability of the "delays" renders it likely that other contractors are including contingencies of similar magnitude in their bids.

However, to the extent that "no damage" clauses are held to impose liability on the contractor for unanticipated impact damages attributable to the owner, provision for such risk by inclusion of a bid contingency is unfeasible. The unforeseeability of this potential liability puts the contractor in the impossible situation of attempting to include in its bid an extra sum great enough to cover any possible delay damages, yet small enough so as not to sacrifice its competitive edge. *See* Nash & Cibinic, *The Changes Clause in Federal Construction Contracts,* 35 GEO. WASH. L. REV. 908 (1967). Nash and Cibinic state:

> It is not practical for a contractor to protect himself from the effects of [impact damages due to owner changes] . . . by including a contingency in his bid price because he has no means of predicting the extent to which he will be delayed by changes. Often the inclusion of such contingencies would result in his bid being non-competitive.

Id. at 937–38. Thus, the assumption made by some courts (*see* case cited at note 33 *supra*) that a contractor is able reasonably to provide by bid contingency for an uncertain risk of loss is unrealistic in light of the competitive situation in the construction industry. *Cf.* Peckar, *supra* note 47 (competition precludes contractors from including a contingency for liquidated late performance damages when the extent of those damages is unforeseeable).

67. For example, a contractor may have no way of foreseeing the extent to which the technical drawings and specifications supplied by the owner will be found in the field to contain more errors than the percentage which is generally expected. Similarly, the contractor has no reasonable basis upon which to anticipate the number or magnitude of changes or redesign which the owner may decide to implement during the project under the authority of the Changes Clause. Nor has the contractor any means to accurately estimate the potential impact damages arising from delayed issuance of approvals, "go-aheads," or engineering data which the owner may be obligated to provide during the job. The extent of these impact damages is unforeseeable because the events giving rise to them are unforeseeable. An owner's negligence, its noncooperation, and its arbitrary changes in the work are not susceptible to reasonable calculation at the time a contractor submits its bid.

ceed what the contractor could reasonably foresee are just as much beyond the contemplation of the parties as delays which are, by their nature, outside what the contractor could anticipate.[68] In either event, enforcement of a "no damage" clause may have the oppressive effect of forcing a contractor to gamble on the quality of the owner's specifications, the owner's promptness in contract administration, and the owner's moderation in exercising authority under the Changes Clause, since delay damages arising from the owner's failures in these areas may be held nonrecoverable.

Courts have not always rationally analyzed the scope of contemplated delays. Some have concluded that so long as the *type* of delay was foreseeable, the question of its foreseeable *extent* will not enter into the determination of whether a "no damage" clause is enforceable.[69] However, any genuine inquiry into the intent of the contracting parties with respect to the clause must include not only a practical determination of the delays which were within their reasonable contemplation, but also a determination of the contemplated *magnitude* of such delays.

68. *See, e.g.,* Coley Properties Corp., PSBCA No. 291, 75–2 BCA ¶ 11,514, at 54,916 (1975) (recognizing and discussing the significant cost impact of mass changes, awarding impact damages to contractor on that basis); Kroeger v. Franchise Equities, Inc., 190 Neb. 731, 212 N.W.2d 348 (1973) (four-month delay of construction by owner not a *revision* of Critical Path schedule within meaning of contract and contemplation of parties); City of Seattle v. Dyad Constr., Inc., 17 Wn. App. 501, 517, 565 P.2d 423, 433 (1977) ("delays may be so substantial as to be beyond the reasonable contemplation of the parties, and delays may be so large that they devastate the planned cost and time structure upon which the contractor based his bid").

69. *See, e.g.,* McDaniel v. Ashton-Mardian Co., 357 F.2d 511 (9th Cir. 1966) (court upheld "no damage" provision, upon a finding that potential damage from delay is inherent in any construction contract, without inquiring further into the foreseeable extent of such delay); Nelse Mortensen & Co. v. Group Health Coop., 17 Wn. App. 703, 566 P.2d 560 (1977) (court upheld "no damage" clause, asserting that as long as owner-caused delay was of a nature contemplated by the parties, and a time extension was provided, then the delay could not be deemed unreasonable); S.L. Rowland Constr. Co. v. Beall Pipe & Tank Corp., 14 Wn. App. 297, 540 P.2d 912 (1975) ("no damage" clause held sufficiently broad to bar contractor's claim for impact damages arising from owner's plan changes; no further inquiry made by court into the foreseeable extent of such delays).

A similar attitude pervaded the Washington Supreme Court decision in Ericksen v. Edmonds School Dist. No. 15, 13 Wn. 2d 398, 125 P.2d 275 (1942), in which a "no damage" clause was given full effect:

> The probability of the occurrence of delays was clearly foreseen by the parties to this action, as the language of the contract repeatedly discloses, and they specifically provided that the contractor's remedy therefor should take the form of an extension of time. The presumption therefore is that the parties intended such an extension of time to be the sole remedy for delays encountered in the performance of the contract.

Id. at 412, 125 P.2d at 281. First, the court made no inquiry into the presence of

E. Safeguarding Limited Appropriations Against Vexatious Claims

In attempting to justify the enforcement of "no damage" provisions, some courts have argued that such clauses are conceived to further the public interest in protecting government agencies, contracting with fixed appropriations, against vexatious litigation.[70] This notion is, however, strongly refuted by the example of the federal government, which, despite its own fixed appropriations, expressly acknowledges a contractor's right to recover impact damages.[71] Furthermore, a contractor must always carry a substantial burden of proof to obtain such recovery.[72]

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genuine bargaining to ascertain the parties' true intent. Second, the decision adopted the dubious characterization of an extension of time as the contractor's remedy. *See* notes 50–53 and accompanying text *supra*. Most important, the court focused solely on the fact that the occurrence of owner-caused delays was foreseeable, while failing to consider the fact that the extent of these delays may have been unforeseeable at the time the contract was made. This was a misapplication of the test of foreseeability.

A better test was recently applied by the Washington Court of Appeals in City of Seattle v. Dyad Constr., Inc., 17 Wn. App. 501, 565 P.2d 423 (1977): "[D]elays may be so substantial as to be beyond the reasonable contemplation of the parties, and delays may be so large that they devastate the planned cost and time structure upon which the Contractor based his bid." *Id.* at 517, 565 P.2d at 433. The court in *Dyad* held that a "no damage" clause may be unenforceable when it bars a contractor's recovery of damages for unforeseeable delays, because the clause does not cover delays amounting to a breach of contract (*e.g.*, breach of the owner's implied duty not to hinder the contractor). Such a holding conflicts with those decisions which conclude that a contractor's right to recover for unforeseeable owner-caused hindrances and delays may be waived by a "no damage" clause. *See* cases cited at notes 6, 38, & 58 *supra*, 102 *infra*. Thus, the *Dyad* court comes closer than most to appreciating the importance of applying a true "contemplation of the parties" test.

70. "Stipulations like ["no damage" clauses] are obviously conceived in the public interest in protecting public agencies contracting for large improvements on the basis of fixed appropriations or loan commitments against vexatious litigation based on claims, real or fancied, that the agency has been responsible for unreasonable delays." A. Kaplen & Son, Ltd. v. Housing Auth., 42 N.J. Super. 230, 126 A.2d 13, 15 (1956). *Accord,* Peter Kiewit Sons' Co. v. Iowa S. Utils. Co., 355 F. Supp. 376, 396 (S.D. Iowa 1973). Note that this reasoning carries no force by analogy with respect to "no damage" clauses in contracts advertised by private owners. As between a private owner and a private contractor, there is no apparent public interest served by transferring liability for the owner's delays to the contractor. Moreover, there is nothing comparable to sovereign immunity in the private sector, by which the fact that a claim may be vexatious or fancied might be used to justify barring a contractor's right to sue for impact damages.

71. *See* note 13 *supra*, notes 74 & 76 and accompanying text *infra*.

72. Even in the absence of a "no damage" clause, as in federal construction contracts, a contractor must meet the burden of proof in showing both that the owner caused delays on the project and that whatever impact damages are claimed are attributable to such delays. "It is axiomatic that a contractor asserting a claim against the Government must prove not only that it incurred the additional costs making up its claim but also that such costs would not have been incurred but for Government action." Fischbach & Moore Int'l Corp., ASBCA No. 18,146, 77–1 BCA ¶ 12,300, at 59,204, 59,224 (1976). *Accord,* Leonard Pevar Co., PSBCA No. 219, 77–2 BCA

III. FEDERAL CONSTRUCTION CONTRACTS

In contrast to the rules governing contracts under state law, the body of law which governs federal construction contracts[73] consistently recognizes the distinction between those owner-caused delays which are reasonable and those which are not. In the latter case, the contractor is permitted to recover impact damages,[74] despite the presence of exculpatory language in the contract.[75] Moreover, the federal government refrains from using "no damage" clauses in its standard contracts, specifically to avoid the inequities of a bar to the recovery of impact damages.[76] The standard federal construction contract provides the contractor with an equitable adjustment[77] for owner

¶ 12,690, at 61,578 (1977) (contractor must show that work was unreasonably delayed by act or failure to act of contracting officer and that costs claimed resulted from such delay).

73. *See, e.g.*, Southwest Eng'r Co. v. United States, 341 F.2d 998 (8th Cir.), *cert. denied*, 382 U.S. 819 (1965) (federal law controls in the construction and determination of rights under federal contracts).

74. *See* cases cited at note 13 *supra*.

75. *See, e.g.*, Morrison-Knudsen Co. v. United States, 397 F.2d 826 (Ct. Cl. 1968) (contractor recovered impact damages attributable to site conditions differing from those represented by the contract documents, despite Government disclaimer of responsibility therefor).

76. Under the present standard federal construction contract Changes Clause, 41 C.F.R. § 1–7.602–3(d) (1977), a contractor is expressly granted a right to recover an equitable adjustment for impact damages (*i.e.*, increased costs of unchanged work) arising from changes made by the Government-owner. This equitable provision was added to the standard federal contract intentionally to counteract the doctrine of United States v. Rice, 317 U.S. 61 (1942), in which the United States Supreme Court had rejected the fundamental equity of permitting a contractor to recover such impact damages. The *Rice* decision was described by one commentator as displaying "an abysmal ignorance of the effect of delay on the cost of performance." Shedd, *The Rice Doctrine and the Ripple Effects of Changes*, 32 GEO. WASH. L. REV. 62, 69 (1963). The results of the decision were also labelled as "basically unfair." Nash & Cibinic, *The Changes Clause in Federal Construction Contracts*, 35 GEO. WASH. L. REV. 908, 938 (1967). The court of claims discussed the amendment to the standard federal construction Changes Clause and its purpose in repudiating the *Rice* decision and expressly permitting a contractor to recover impact damages in Merritt-Chapman & Scott Corp. v. United States, 429 F.2d 431, 445–46 & n.28 (Ct. Cl. 1970).

77. One court reasoned,

> Equitable adjustments . . . are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract. Since the purpose underlying such adjustments is to safeguard the contractor against increased costs engendered by the modification, it appears patent that the measure of damages cannot be the value received by the Government, but must be more closely related to and contingent upon the altered position in which the contractor finds himself by reason of the modification.

Bruce Constr. Corp. v. United States, 324 F.2d 516, 518 (Ct. Cl. 1963). *See also* Merritt-Chapman & Scott Corp. v. United States, 429 F.2d 431 (Ct. Cl. 1970) (under federal Changes and Changed Conditions articles, the equitable adjustment shall include increased costs which are the direct and necessary result of the change or changed condition).

changes,[78] differing site conditions,[79] and, under section 32(b), for any period by which the Government-owner unreasonably suspends, delays, or interrupts the contractor's performance.[80]

In determining that a Government delay is "unreasonable" under section 32(b), the primary test is foreseeability.[81] This approach presupposes that an unreasonable delay will be unforeseeable. Contracting parties are entitled to anticipate reasonable good faith performance and cooperation on the part of other parties to the contract.[82] Of course, this does not mean that the parties may not include in their agreement a term fixing mutual obligations and rights in the event of future breach, but they must do so by means of a valid liquidated damages clause.[83]

Thus, where a contractor can make a sufficient showing that it was damaged by Government delays in excess of what reasonably could have been anticipated upon bidding the job, it may obtain recovery[84] which might have been denied under a nonfederal contract containing a "no damage" clause.[85] The first step in this federal contract analysis is to determine the period of "delay" which the contractor could have foreseen. This period is then subtracted from the total actual delay to determine the period for which the contractor is entitled to compensation.[86]

78. 41 C.F.R. § 1–7.602–3 (1977).
79. *Id.* § 1–7.602–4.
80. Section 32(b) reads:

> If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly.

Id. § 1–7.602–32(b).
81. *See* GOV'T CONTRACTOR, Apr. 1, 1974, ¶ 120.
82. *See* notes 99–101 and accompanying text *infra*. *See generally* U.C.C. § 1–203 (underlying obligation to act in good faith).
83. *See* note 92 and accompanying text *infra*.
84. *See* cases cited at note 13 *supra;* notes 74 & 77 and accompanying text *supra*.
85. The contractor's recovery might be barred absent some further showing of fraud or active interference on the part of the owner. *See* notes 6 & 35 and accompanying text *supra*.
86. In Hardie-Tynes Mfg. Co., ASBCA No. 20,582, 76–2 BCA ¶ 11,972, at 57,377 (1976), the contractor recovered for impact damages arising from Government delays in responding to requests for engineering information. The Board concluded,

> The Government was dilatory in notifying the contractor of whether the requests were approved or disapproved, and the contractor was injured by the delays due to the effects of inflation on its costs. . . . In assessing the extent of the delays

The federal system yields a far more equitable result than that attained where "no damage" clauses are upheld to force contractors to assume an indeterminate liability for delays attributable to the owner under circumstances which effectively preclude contractors from covering the risk in their bids.

IV. ANALOGY TO LIQUIDATED DAMAGES

The foregoing discussion emphasized the harsh effect of "no damage" clauses in imposing liability on contractors for unforeseeable delays caused by owners,[87] raised the issues of disparity in bargaining power[88] and unconscionability,[89] and summarized the federal contract system as a constructive comparison.[90]

The legal tests governing the enforcement of liquidated damage clauses provide an additional illustration of the inequity of enforcing "no damage" clauses. Liquidated damage clauses are agreements made in advance of breach, fixing the damages therefor.[91] According to the *Restatement of Contracts,* such an agreement is not enforceable as a contract and does not affect the damages recoverable for the breach unless:

(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and
(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.[92]

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caused appellant by untimely Government responses to REIs, we must determine a reasonable time for the Government to make such responses.

Id. at 57,379; *see, e.g.,* Charles H. Berry, Gen. Contractor, Inc., DOT CAB No. 67-47, 69-2 BCA ¶ 7775, at 36,094 (1969) (fifteen days held to be a reasonable time for Government to approve shop drawings, and contractor recovered for delays in excess of that period).

87. *See* note 37 and accompanying text *supra.*
88. *See* notes 48 & 49 and accompanying text *supra.*
89. *See* note 44 *supra.*
90. *See* Part III *supra.*
91. *See* C. MCCORMICK, DAMAGES § 146, at 599 (1935) (emphasis in original): *Liquidated damages* are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally recoverable or retainable as agreed damages if the breach occurs.

See, e.g., Martinson v. Brooks Equip. Leasing, Inc., 36 Wis. 2d 207, 152 N.W.2d 849 (1967) (liquidated damage provision is an attempt to predetermine damages in event of breach); RESTATEMENT OF CONTRACTS § 339 (1932).

92. RESTATEMENT OF CONTRACTS § 339 (1932).

These standards for testing the validity of liquidated damage provisions are often cited and generally accepted in both the federal and state courts.[93] Impact damages will probably meet the second criterion—damages will be difficult to determine in the event of breach.[94] The following discussion will therefore focus on the first criterion. In functional terms, a "no damage" provision in a construction contract is analogous to a liquidated damage provision. As a result, the former ought to be invalidated whenever it fails to meet the test of "reasonable forecast of just compensation for . . . breach" which limits the enforcement of the latter.[95]

A. "No Damage" Clause Fixing Damages for Breach

Before applying the "reasonable forecast of just compensation" test to "no damage" clauses, it must first be determined that "no damage" clauses in fact function like liquidated damage provisions, *i.e.*, fixing damages for future breach of contract.[96] A contractor is presumed to have anticipated in its bid the costs associated with foreseeable "delays"; therefore, it is unreasonable owner-caused delay which is at

93. In the following cases, a liquidated damage provision was tested by the criteria for enforceability set forth in the *Restatement of Contracts:* United Order of American Bricklayers No. 21 v. Thorleif Larsen & Son, Inc., 519 F.2d 331 (7th Cir. 1975); *In re* Plywood Co., 425 F.2d 151 (3d Cir. 1970); Southwest Eng'r Co. v. United States, 341 F.2d 998 (8th Cir.), *cert. denied,* 382 U.S. 819 (1965); Bruno v. Pepperidge Farm, Inc., 256 F. Supp. 865 (D. Pa. 1966); Zurich Ins. Co. v. Kings Indus., Inc., 255 Cal. App. 2d 919, 63 Cal. Rptr. 585 (1967); Oldis v. Gross-Rhode, 35 Colo. App. 46, 528 P.2d 944 (1974); Norwalk Door Closer Co. v. Eagle Lock & Screw Co., 153 Conn. 681, 220 A.2d 263 (1966); Nu Dimensions Figure Salons v. Becerra, 73 Misc. 2d 140, 340 N.Y.S.2d 268 (Civ. Ct. N.Y. 1973); Northwest Collectors, Inc. v. Enders, 74 Wn. 2d 585, 446 P.2d 200 (1968); S.L. Rowland Constr. Co. v. Beall Pipe & Tank Corp., 14 Wn. App. 297, 540 P.2d 912 (1975) (invalidating a liquidated damage provision on the ground it was not a reasonable forecast of just compensation for breach, while simultaneously upholding validity of a "no damage" clause); Brower Co. v. Garrison, 2 Wn. App. 424, 468 P.2d 469 (1970). *See also* 5 A. CORBIN, CONTRACTS §§ 1059, 1063 (1964).

94. *But see* Sweet, *supra* note 48, at 117:

> [D]elay caused by the owner or misrepresentation of soil data generally increase the cost of doing the work to the contractor, and this is a type of damages that courts are generally able to handle. Since these costs are relatively easy to prove at the time of trial—apart from a possible dispute over causation or foreseeability—it is unlikely that a court would enforce a liquidated damages clause for these breaches.

95. RESTATEMENT OF CONTRACTS § 339 (1932).

96. Support for the conclusion that "no damage" clauses function to fix damages in the event of breach is found in the fact that courts on a number of occasions have referred to the contractor's time extension under such provisions as a "remedy." *See, e.g.,* Ericksen v. Edmonds School Dist. No. 15, 13 Wn. 2d 398, 125 P.2d 275 (1942), *quoted at* note 69 *supra.*

issue. This kind of delay, arising from design defects, delayed performance, or unilateral changes of sufficient magnitude, is unforeseeable, either in nature or in scope.[97] Unreasonable owner-caused delays breach two major implied owner's warranties: (1) the implied duty not to hinder the contractor; (2) the implied warranty of specifications.

The Washington Supreme Court discussed the first of these in *Edwards Contracting Co. v. Port of Tacoma*:[98] "In every construction contract there is an implied term that the owner or person for whom the work is being done will not hinder or delay the contract, and for such delays the contractor may recover additional compensation."[99] This implied warranty includes a duty of good faith[100] and is generally recognized by both state and federal courts.[101] Some courts have indicated specifically that a contractor's right to obtain damages for breach of this implied warranty is foreclosed by a properly drafted "no damage" clause.[102] In the absence of a "no damage" clause, however, a breach of the implied nonhindrance warranty might arise when an owner fails to process design changes or work approvals in a reasonably timely manner,[103] when the owner's changes in the work exceed a foreseeable magnitude,[104] and finally, when an owner's ac-

97. *See* notes 54–69 and accompanying text *supra*.

98. 83 Wn. 2d 7, 514 P.2d 1381 (1973).

99. *Id.* at 13, 514 P.2d at 1385.

100. *See, e.g.*, Miller v. Othello Packers, Inc., 67 Wn. 2d 842, 410 P.2d 33 (1966) (there is an implied covenant of good faith and fair dealing in every contract); Long v. T–H Trucking Co., 4 Wn. App. 922, 486 P.2d 300 (1971) (contracts contain implied condition that parties will not interfere with each other's performance, but will cooperate in good faith).

101. *See, e.g.*, Burgess Constr. Co. v. M. Morrin & Son Co., 526 F.2d 108 (10th Cir. 1975), *cert. denied*, 429 U.S. 866 (1976) (unreasonable delay is breach of implied duty not to hinder other party); L.L. Hall Constr. Co. v. United States, 379 F.2d 559 (Ct. Cl. 1966); Glassman Constr. Co. v. Maryland City Plaza, Inc., 371 F. Supp. 1154 (D. Md. 1974) (breach of implied duty to cooperate); Shalman v. Board of Educ., 31 App. Div. 2d 338, 297 N.Y.S.2d 1000 (1969); V.C. Edwards Contracting Co. v. Port of Tacoma, 83 Wn. 2d 7, 514 P.2d 1381 (1973).

102. *See, e.g.*, Peckham Rd. Co. v. State, 32 App. Div. 2d 139, 300 N.Y.S.2d 174 (1969), *aff'd*, 28 N.Y.2d, 734, 269 N.E.2d 826, 321 N.Y.S.2d 117 (1971) (owner may relieve itself of implied warranty not to obstruct contractor by express language in contract); Ericksen v. Edmonds School Dist. No. 15, 13 Wn. 2d 398, 125 P.2d 275 (1942) (contractor precluded by express "no damage" provision from maintaining action for damages from owner's hindrances and delays). *See also* note 50 *supra* (reference to "specific waiver" of contractor's right to recovery).

103. *See, e.g.*, Laburnum Constr. Corp. v. United States, 325 F.2d 451 (Ct. Cl. 1963) (contractor recovered "impact damages" arising from delays in project redesign and survey authorization attributable to defective Government specifications).

104. *See* notes 14 & 68 *supra*. *See also* note 69 and accompanying text *supra*.

tions interfere with a contractor's orderly sequence of work.[105] Thus, inasmuch as a "no damage" clause fixes a contractor's recovery for such damages at zero, it functions to fix damages for future breach as does a liquidated damage clause.

A second implied obligation of an owner is the warranty that the specifications and drawings which are advertised for bidding are reasonably workable. This principle was clearly enunciated in *Laburnum Construction Corp. v. United States:*[106] "If faulty specifications prevent or delay completion of the contract, the contractor is entitled to recover damages for the defendant's breach of its implied warranty."[107] This warranty is consistently implied in federal construction contracts.[108] It has also been given effect in a number of states[109] and is substantially recognized in Washington.[110]

In enforcing the implied warranty of specifications, the court in *Laburnum* reasoned, "The defendant cannot, by errors in the specifica-

105. *See* Fischbach & Moore Int'l Corp., ASBCA No. 18,146, 77-1 BCA ¶ 12,300, at 59,204 (1976) (Government suspension of work disrupted contractor's planned orderly schedule for transmission tower fabrication and erection; contractor obtained recovery); J. McBRIDE & I. WACHTEL, *supra* note 2, § 31.80[1] (a forced change in the sequence of the contractor's work, or a Government failure to observe that sequence, is a breach).

106. 325 F.2d 451 (Ct. Cl. 1963).

107. *Id.* at 457.

108. *See, e.g.,* United States v. Spearin, 248 U.S. 132 (1918) (implied warranty that owner's plans and specifications will be adequate); Chaney & James Constr. Co. v. United States, 421 F.2d 728 (Ct. Cl. 1970); John McShain, Inc. v. United States, 412 F.2d 1281 (Ct. Cl. 1969); Leslie-Elliott Constructors, Inc., ASBCA No. 20,507, 77-1 BCA ¶ 12,354, at 59,783 (1977).

109. *See, e.g.,* Centex Constr. Co. v. James, 374 F.2d 921 (8th Cir. 1967) (applying Arkansas law); Rosell v. Silver Crest Enterprises, 7 Ariz. App. 137, 436 P.2d 915 (1968); Katz v. Judice, 252 So. 2d 532, *writ denied,* 259 La. 1049, 254 So. 2d 461 (1971); Alpert v. Commonwealth, 357 Mass. 306, 258 N.E.2d 755 (1970); A.H. Barbour & Son, Inc. v. State Highway Comm'n, 248 Or. 247, 433 P.2d 817 (1967).

110. The most recent affirmation of the implied warranty of construction specifications in Washington appears in City of Seattle v. Dyad Constr., Inc., 17 Wn. App. 501, 517, 565 P.2d 423, 433 (1977): "[W]hen an owner furnishes plans and specification for a construction project prescribing a time for completion of the work, there exists an implied warranty that the contractor will be able to complete the project timely, as designed." The only apparent limitation on this rule may arise from the decision in Dravo Corp. v. Municipality of Metropolitan Seattle, 79 Wn. 2d 214, 484 P.2d 399 (1971), which held that an owner's implied warranty with respect to represented site conditions could effectively be disclaimed by an express contract term. Narrowly construed, this decision in no way altered the court's prior recognition of an implied warranty regarding building methods represented in the specifications. Prier v. Refrigeration Eng'r Co., 74 Wn. 2d 25, 442 P.2d 621 (1968). Nor does it appear to apply where the owner's liability is not expressly disclaimed. To the extent that *Dravo* upholds a disclaimer of owner's liability for impact damages arising from site conditions which vary from what is represented to bidders in the contract documents, it is subject to the same general criticisms which may be offered with respect to the enforcement of "no damage" provisions.

tions, cause delay in plaintiff's completion of the work and then compensate plaintiff by extending its performance time and by payment of any added direct cost occasioned by changes to correct those errors."[111] This statement illustrates the difference between the rules governing federal construction contracts and those which apply in the states which enforce "no damage" clauses; the result being criticized by the court of claims is precisely that worked by a "no damage" provision. The *Laburnum* court held that the contractor's remedy was an action for breach of contract.[112] It follows that when a state court holds that a "no damage" provision may bar recovery for impact damages arising from defective specifications, it effectively holds that the clause may validly fix the contractor's damages for breach at zero. Again, the "no damage" clause functions like a liquidated damage clause.

In short, there are at least two implied warranties which would give rise to contractor actions for breach of contract in the absence of a "no damage" clause in the event of owner-caused delay. Whenever a "no damage" clause works to bar a contractor's recovery of impact damages under these circumstances, it necessarily functions to fix damages for future breach.

B. Reasonable Forecast of Just Compensation

A "no damage" clause fixes the remedy for owner's breach at a time extension plus a reimbursement of increased material and labor costs directly associated with any work changed under the Changes Clause. With respect to impact damages arising from the owner's delays, the contractor's recovery is fixed at zero. Such a remedy cannot qualify as a reasonable forecast of just compensation, because the clause fixes impact damages in the event of the owner's breach at an unreasonably low amount. It has already been established that owner-caused delays are likely to cause impact damages which may constitute a significant item of cost to the contractor. The fact that such damages are likely to result from owner-caused delay is foreseeable when the contract is made, but the contractor may not reasonably anticipate such possible damages by a bid contingency because their extent is unforeseeable. It

111. 325 F.2d at 457–58.
112. *Id.* at 457, *quoted at* text accompanying note 107 *supra.*

follows that an agreement for the purpose of fixing damages in the event of breach which precludes any recovery for a substantial element of damages arising from such a breach is from the outset not a reasonable forecast of just compensation.

A further example may clarify the analogy. A contract may set liquidated damages for delayed performance at an essentially nominal amount (*e.g.*, ten dollars per day) for delays caused by owner's breach of its implied warranties of specifications and nonhindrance. The apparent majority rule will not permit enforcement of liquidated damage provisions which are either unreasonably high or unreasonably low.[113] Because these damages are plainly nominal in relation to the substantial damages which would foreseeably arise in the event of a delay breach, the clause could properly be invalidated for its failure to constitute a reasonable effort to forecast just compensation.[114] A hypothetical contract providing only one dollar per day for owner-caused delay would logically be even more susceptible to being invali-

113. *See* Bonhard v. Gindin, 104 N.J. 599, 142 A. 52 (1928); J. CALAMARI & J. PERILLO, *supra* note 44, § 14–31, at 566 n.96; C. MCCORMICK, DAMAGES § 149 (1935); 5 S. WILLISTON, CONTRACTS § 779 (3d ed. 1961). *But see* Mahoney v. Tingley, 85 Wn. 2d 95, 529 P.2d 1068 (1975). In *Mahoney*, the Washington Supreme Court held that a liquidated damage provision in a real estate earnest money agreement would be enforced even though it limited the seller's recovery to substantially less than its actual damages arising from the buyer's default. The *Mahoney* decision rested solely on a North Carolina decision, Kinston v. Suddreth, 266 N.C. 618, 146 S.E.2d 660 (1966), which held that a seller damaged under similar facts could not recover damages beyond the amount stipulated in the liquidated damage clause, although such a limitation was unreasonably low. To the extent that the court in *Mahoney* concluded that a liquidated damage clause could still be enforced even though it provided an unreasonably low amount of damages, the Washington Supreme Court not only reversed the court of appeals (*see* opinion by Horowitz, J., in Mahoney v. Tingley, 10 Wn. App. 814, 520 P.2d 628 (1974)), but it also held contrary to the decided weight of legal scholarship on this issue.

Furthermore, the facts in *Mahoney* are distinguishable from those in which a "no damage" provision is involved. In *Mahoney*, the party seeking recovery of damages beyond the liquidated damage sum was the real estate seller, *i.e.*, the author of the parties' agreement. Contrast this with a standard competitively bid construction contract, in which it is the contractor, and not the author of the contract (*i.e.*, the owner) which may assert the inadequacy of the liquidated damage sum as compensation for the cost impact of changes and other delays arising from the owner's breaches. In the earnest money cases, the seller could simply have demanded more protection, by increasing the liquidated damage amount or by dispensing with the clause altogether. No analogous option is available to a contractor in a competitively bid construction contract, which must either be accepted "as is" or not bid on at all.

In any event, although Washington law appears in doubt on this issue, it seems reasonable to treat as the general rule of the states that a liquidated damage provision may be invalidated if it provides (at the time of contract formation) either unreasonably large or unreasonably small damages.

114. RESTATEMENT OF CONTRACTS § 339 (1932), *quoted at* text accompanying note 92 *supra*.

dated under this reasoning. Finally, a contract containing a "no damage" clause, limiting the contractor's recovery to zero for breaches which, because they are unforeseeable, lie outside the terms bargained for in the contract, is the ultimate unreasonable forecast of damages and ought to be denied enforcement.

V. CONCLUSION

The operative effect of a "no damage" clause is to bar a contractor from recovering impact damages arising from unforeseeable delays which are attributable to the owner. When it is so enforced, the clause works the oppressive effect of subjecting a contractor to broad and uncertain liability for which it cannot adequately provide in its bid. Although the courts have given nominal recognition to the rule that the clause ought not be upheld to bar the recovery of damages arising from delays beyond the contemplation of the contracting parties, this limitation has been neither consistently applied nor clearly understood. Too many courts fail to inquire into the nature of the competitive bidding process, the extent to which it embodies actual bargaining, and the potential for imposing oppressive or unconscionable terms by one contracting party on another.

When impact costs are foreseeable and therefore calculable, within reasonable tolerances, a "no damage" clause has no operative effect. The contractor is barred from recovering additional compensation, because it is required to anticipate such costs in its bid. When, however, it is found that the impact damages suffered by a contractor were unforeseeable and would otherwise give rise to an action for breach of implied warranties, a "no damage" clause ought not be enforced to bar such recovery, for the same reasons that unreasonably low liquidated damage provisions are not enforced. Because "no damage" clauses are either unnecessary to bar a contractor's recovery when delays are foreseeable, or impose an unreasonable burden on a contractor when delays are unforeseeable, equity would best be served by denying them any operative effect.

Douglas S. Oles